# Law and Outsiders

## Norms, Processes and 'Othering' in the 21st Century

Edited by
Cian C Murphy and Penny Green

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## Norms, Processes and 'Othering' in the Twenty-first Century

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# *Preface*

*Law and Outsiders* is a selection of essays presented at the International Graduate Legal Research Conference at King's College London. This collection represents some of the very best international doctoral scholarship being conducted in law schools today. Over 150 papers were submitted for consideration, of which only a third were accepted for presentation at the Conference. The essays presented here, while eclectic at one level, share common ideas, themes and modes of discussion. The high standard of research presented, as well as its topicality, made the publication of this volume not only desirable but a valuable contribution to legal scholarship. *Law and Outsiders* represents fresh work from some of the world's leading young researchers.

The book is presented in five sections: adjudication; European law and politics; migration, minorities and identity; and the limits of law.

Adjudication focuses on judicial review in common law systems. The first two essays of the volume address proportionality as a principle in judicial review. Martin Luteran and Paul Daly grapple with this key principle from differing perspectives. Luteran seeks to examine competing conceptions of proportionality while Daly's highly critical exposition warns against treating the principle as a panacea. In the final essay in this section, Nelson Dordelly-Rosales explores constitutional judicial review as a legal doctrine and political power. In considering schools as disparate as positivism and critical legal studies, he argues that an eclectic vision is necessary for constitutional interpretation. Together the essays offer valuable theoretical insights into an often doctrinal area of law.

In the second section, European law and politics, the authors analyse the developing European Union constitutional settlement. Eulalia Sanfrutos Cano examines the enduring variation of powers within the European Union after the ratification of the Lisbon Treaty. She concludes that following ratification, some areas of EU law will remain an 'imbroglio'. Matthias Kettemann also examines developments in light of the Lisbon Treaty, but takes as his subject the democratic deficit within the European Union. He concludes that European democratic legitimation requires active civil society and an engaged citizenry. Marton Varju examines the different levels of human rights protection in the European Convention and European Union legal systems. He makes a convincing argument that, contrary to the views of some commentators, human rights protection in Europe is not diverg-

ing. These seemingly abstract constitutional questions directly influence participation in governance today.

The section on migration is perhaps most obviously linked with 'outsiders'. These three essays, which are each concerned with the status of third-country nationals in the European Union, explore a pressing issue of EU law. Diego Acosta analyses the status of long-term residents under Directive 2003/109. He goes beyond existing debates about 'otherness' and integration to demonstrate that the Directive could be used to aid Turkish citizens within the Union. Stephen Coutts examines a particular group of third-country nationals—those who are family members of EU citizens without independent rights to free movement under national law. He is critical of the use of the fundamental freedoms of the internal market as a tool of immigration policy. In the final essay in this section, Egle Dagilyte argues that the work-related social human rights of third-country nationals legally residing and working in the European Union leaves them vulnerable to the dangers of social dumping. She concludes that in order to achieve the Community objectives of high employment and social protection for third-country nationals, the principle of *lex loci laboris* must apply.

If the section on migration addresses geographic outsiders, the section on vulnerable minorities addresses the 'outsider within'. Benedetta Faedi's essay conducts a gendered analysis of war and peace-making. She argues that despite women's demonstrable agency in the struggle for peace, they are largely excluded from official conflict-resolution and peace-building mechanisms. Dorota Gozdecka's essay considers Europe's changing approach to blasphemy. Her work examines the recent resurrection of the crime of blasphemy in light of conflicting viewpoints on religious freedom. Vincent Depaigne's essay takes a legal approach to cultural identity and human rights. He interrogates neutral, multicultural and asymmetric models of the nation-state and calls for a new conception of the state.

The volume is rounded off with an excellent essay on the limits of law. Craig Reeves draws on the work of Arendt and Adorno to explore the concept of judgment in law and morality. He argues that Arendt's failing is her separation of the individual from the sociohistorical. In a complex and compelling discussion on judgment in an antagonistic world, he claims that Adorno's natural history perspective offers the possibility of moral autonomy and all that it involves.

Our work in editing this volume was greatly aided by those who organised and participated in the Conference. We are grateful to the Committee and volunteers of the International Graduate Legal Research Conference for their hard work and enthusiastic dedication to making the Conference a success. Thanks are also due to our colleagues in the School of Law and Graduate School, whose support—both administrative and academic—was invaluable. Many colleagues offered help and advice on the papers even-

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The last and greatest thanks must go to Richard Hart and all the staff at Hart Publishing. Richard has supported this project since the idea of a graduate student conference was mooted in 2006. His presence at the Conference greatly enriched the event, and his willingness to publish a collection of work by scholars at the very start of their careers is a shining example in an all too commercial age. We thank him and his staff for their diligence in turning the rough manuscript we submitted last spring into the attractive volume you hold today.

Cian Murphy and Penny Green
*London, 7 November 2010*

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# Adjudication

# 1

# *Towards Proportionality as a Proportion Between Means and Ends*

MARTIN LUTERAN

## 1. INTRODUCTION

THIS CHAPTER ARGUES for a new approach to the principle of proportionality in European human rights law. Although the prevalent conventional understanding of proportionality identifies it with balancing, it is not the only available conception of proportionality. The conception of proportionality as a proportion between means and ends deserves closer attention by the European Court of Human Rights (ECtHR or 'the Court') and legal scholars. It is a coherent, historically rooted and ultimately more helpful conception than that of balancing. The purpose of this contribution is to outline the main contours of the principle of proportionality as a proportion between means and ends and suggest that it is worthy of further study and development. The whole argument will be more suggestive than conclusive.

Eissen argued in his 1993 study on the juridical principle of proportionality, often cited by later works, for the following conclusion:

> Over the years proportionality has put down solid and lasting roots in the case-law of the European Court of Human Rights, and these roots will in all likelihood go even deeper, continuing to broaden the scope of the principle so as to embrace even more aspects of the Convention. Indeed the extent to which this has already occurred suggests that it has even now acquired the status of a general principle in the Convention system.[1]

This identification of the principle of proportionality as a general princi-

[1] M-A Eissen, 'The Principle of Proportionality in the Case-Law of the European Court of Human Rights' in RSJ Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Dordrecht, Martinus Nijhoff, 1993) 146.

ple of Convention law was confirmed by later studies of other authors.[2] Cremona epitomised the contemporary conventional understanding of proportionality as 'balancing':

> Essentially this [proportionality] is but another facet of the concept of balance, and balance is very much at the centre of the whole subject of the protection of human rights, there being a sort of inbuilt balancing mechanism in the whole structure of the Convention.[3]

The ECtHR made it also clear on several occasions that the requirement of proportionality and of the 'fair balance' is, in its own understanding, one and the same thing:

> [T]he Court recalls that . . . there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. This latter requirement was expressed in other terms in the above-mentioned Sporrong and Lönnroth judgment by the notion of the 'fair balance' that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[4]

As a result, most debates about proportionality revolve around the meaning and justifiability of the concept of 'balancing'. Some authors praise proportionality precisely because it brought balancing to the centre stage of human rights review.[5] Others reject proportionality because of the various problems they associate with balancing.[6] It is beyond our purposes to engage with this debate now. Suffice it to say that there are two funda-

[2] JJ Cremona, 'The Proportionality Principle in the Jurisprudence of the European Court of Human Rights' in R Bernhardt and U Beyerlin (eds), *Recht Zwischen Umbruch Und Bewahrung: Völkerrecht, Europarecht, Staatsrecht: Festschrift Für Rudolf Bernhardt* (Beitrage Zum Ausländischen Öffentlichen Recht Und Völkerrecht, Bd 120) (Berlin, Springer-Verlag, 1995) 330; Pv Dijk, GJHv Hoof and AW Heringa, *Theory and Practice of the European Convention on Human Rights*, 3rd edn (The Hague, Kluwer, 1998) 81; J McBride, 'Proportionality and the European Convention on Human Rights' in E Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Oxford, Hart Publishing, 1999) 23; J Bomhoff and L Zucca, 'The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights, *Evans v the United Kingdom*, Fourth Section Judgment of 7 March 2006, Application No 6339/05' (2006) 2 *European Constitutional Law Review* 424.

[3] Cremona (n 2) 323.

[4] *Lithgow and Others v United Kingdom* (App nos 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81) (1986) 8 EHRR 329 [120]. This view was further confirmed in (eg) *Agosi v United Kingdom* (App no 9118/80) (1987) 9 EHRR 1 [52]; *Cossey v United Kingdom* (App no 10843/84) (1991) 13 EHRR 622 [41].

[5] R Alexy, *A Theory of Constitutional Rights* (Oxford, Oxford University Press, 2002); J Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 *Cambridge Law Journal* 174.

[6] A Bleckmann and M Bothe, 'General Report on the Theory of Limitations on Human Rights' in ALC De Mestral and McGill University. Institute of Comparative Law (eds), *The Limitation of Human Rights in Comparative Constitutional Law = La Limitation des Droits de L'homme en Droit Constitutionnel Comparâe* (Cowansville, Editions Yvon Blais, 1986) 109; B Cali, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) 29 *Human Rights Quarterly* 251, 269; S Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2008) www.jeanmonnetprogram.org/papers/08/080901.html.

mentally different approaches to balancing. On one hand, some consider balancing to be a special kind of legal reasoning.[7] According to this view, balancing is a unique method for reaching rationally justified conclusions from given premises different from subsumption. It has a capacity to give rational solutions to constitutional dilemmas.[8] We will call this 'interesting balancing'. On the other hand, some use the language of balancing while thinking that

> in some sense 'balancing' amounts to no more than an exercise in interpretation, common in some form or other to the proper understanding of any legal standard, including Convention norms and even to apparently crystal clear legal rules.[9]

The authors of the second approach see balancing as a metaphor that conveys a need for considering all the relevant issues and sometimes making a prudential choice between rationally equally compelling alternatives.[10] The first approach is much more interesting than the second. If balancing is a special kind of legal reasoning, then it deserves the attention and recent popularity it has attracted. However, if it amounts to no more than an exercise in interpretation, then it is unclear why the courts should use the metaphor at all. The conception of proportionality as a proportion between means and ends is incompatible only with the balancing understood in the first, more interesting sense.

Unclarity about these two different senses of balancing may be responsible for the belief that the notion of proportionality is so tied up with balancing that it would be meaningless without it. However, proportionality is tied to balancing only if by balancing we mean a need for a prudential judgment and even then such balancing has a very limited role to play. If by balancing we mean a special kind of legal reasoning which requires (among other things) certain commensuration of individual rights and public interests, then the requirement of a proportionate relationship between means and ends and the requirement of a 'fair balance' between rights and community interests are substantially different. They represent two different conceptions of the principle of proportionality – proportionality as balancing and proportionality as a proportion between means and ends.

[7] R Alexy, 'On Balancing and Subsumption. A Structural Comparison' (2003) 16 *Ratio Juris* 433.

[8] For a discussion of the concept of 'constitutional dilemmas', see L Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford, Oxford University Press, 2007).

[9] SC Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, Cambridge Studies in European Law and Policy (Cambridge, Cambridge University Press, 2006) 211.

[10] This approach is implicit in the following works: McBride (n 2); TJ Gunn, 'Deconstructing Proportionality in Limitations Analysis' (2005) 19 *Emory International Law Review* 465.

Rivers makes a similar distinction. He disagrees with the general impression that 'there is essentially one doctrine of proportionality offering a range of tests directed towards the same end, with minor variations in formulation'.[11] Instead, Rivers proposes, there are two different conceptions of proportionality at work: 'the optimising conception' and 'the state-limiting conception':

> The optimising conception sees proportionality as a structured approach to balancing fundamental rights with other rights and interests in the best possible way. The state-limiting conception sees proportionality as a set of tests warranting judicial interference to protect rights.[12]

Rivers applauds 'the optimising conception' at work in decisions of the ECtHR and criticises 'the inadequate "state-limiting" alternative which has predominated in British courts'.[13] The argument of this chapter agrees with Rivers that there are two fundamentally different conceptions of proportionality at work in human rights law and that the 'optimising conception' of proportionality (or what we call 'proportionality as balancing') is dominating ECtHR reasoning. Where we disagree is in the evaluation of the plausibility and desirability of the 'optimising conception' and the proper understanding of its alternative. What Rivers describes as 'state-limiting' conception is far from the sophistication and richness that the conception of proportionality as a relationship between means and ends, as understood by this work, exhibits. The insufficient understanding of this conception may be a reason for the lack of its appreciation and resulting enthusiasm for 'balancing'.

Goold, Lazarus and Swiney articulate a similar dichotomy in their comprehensive analysis of the case-law on national security in several jurisdictions including the Strasbourg one:

> Proportionality as a legal concept must be distinguished from the concept of balancing. Balancing, as identified in this report, involves a broad brush, and sometimes opaque, analysis aimed at a resolution of the interests and rights involved.[14]

Kumm also suggests that the theories of constitutional rights have to take into account the fundamental difference between balancing and means–ends analysis:

> The idea of deontological constrains can't be appropriately captured within the proportionality structure. The reasons why proportionality analysis and the balancing test in particular is insufficient to capture these concerns is that it

[11] Rivers (n 5) 178.
[12] Ibid, 176.
[13] Ibid, 176.
[14] B Goold, L Lazarus and G Swiney, 'Public Protection, Proportionality, and the Search for Balance' (2007) 10(7) *Ministry of Justice Research Series* i.

> systematically filters out means–ends relationships that are central to the understanding of deontological constraints.[15]

There is an important disagreement between Kumm's analysis and the thesis of this chapter in that Kumm fails to see the connection between proportionality and means–ends analysis. However, there is also an important agreement—there is an essential difference between balancing test and the analysis of the relationships between means and ends.

So far we have suggested that there is a difference between interesting balancing and means–ends analysis and this difference can be reflected in two different conceptions of proportionality. Much has been written on proportionality as balancing and the debate is still continuing.[16] Very little has been written by legal human rights scholars on a general theory of means–ends relationships[17] and nothing can be found specifically on the understanding of legal proportionality as a relationship between means and ends.[18] This chapter aims to start filling this important gap in the literature. The presentation will progress in the following manner. First, we will throw some light on the possible non-legal origin of the principle of proportionality. It will be suggested that there is a long-standing tradition of thinking about action, which had utilised the idea of 'proportionality' long before it appeared in legal thought. This tradition will then be used as an interpretative key to reconstructing the meaning of proportionality in human rights review. The argument will be concluded by elaborating on some of the virtues of this conception of proportionality.

[15] M Kumm, 'What Do You Have in Virtue of Having a Constitutional Right? The Place and Limits of the Proportionality Requirement' in G Pavlakos (ed), *Law, Rights, Discourse: The Legal Philosophy of Robert Alexy* (Oxford, Hart Publishing, 2007) 162.

[16] Apart from the works already mentioned, see also Alexy (n 7); J Habermas and W Rehg, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity, Cambridge 1996) 259; S Greer, 'Constitutionalizing Adjudication under the European Convention on Human Rights' (2003) 23 *Oxford Journal of Legal Studies* 405; S Greer, '"Balancing" and the European Court of Human Rights: A Contribution to the Habermas–Alexy Debate' (2004) 63 *Cambridge Law Journal* 412; S Palmer, 'A Wrong Turning: Article 3 ECHR and Proportionality' (2006) 65 *Cambridge Law Journal* 438; A Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale Law Journal* 943; I Porat, 'The Dual Model of Balancing: A Model for the Proper Scope of Balancing in Constitutional Law' (2005–06) 27 *Cardozo Law Review* 1393.

[17] Kumm situates means–ends relationships as deontological constraints against consequentialism: Kumm (n 15) 153. Waldron uses means–ends distinction in his characterisation of terrorism: J Waldron, 'Terrorism and the Uses of Terror' (2004) 8 *Journal of Ethics* 5. There is of course considerable amount of philosophical literature on means–ends relationships, especially as pertaining to the understanding of intention. Likewise, debates in criminal law about intention cannot avoid discussing means and ends: (eg) W Chan and AP Simester, 'Intention Thus Far' [1997] *Criminal Law Review* 704.

[18] This is not to deny that the debate on proportionality as balancing often uses the concepts of means and ends. However, there is much confusion about the precise meanings of these concepts. For example, Fordham and de la Mare offer a comprehensive overview of the various understanding of the principle of proportionality in which they identify overall cost and benefit of a state action with means/ends fit: M Fordham and T de la Mare, 'Identifying

## 2. THE ORIGINS OF PROPORTIONALITY

The idea of proportionality appeared in the context of European human rights review in 1950s in Germany[19] and in late 1960s in Strasbourg.[20] Where did this idea come from? Some see the origins of the idea in German police laws of the nineteenth century.[21] Others recognise that 'the roots of the doctrine lie in much broader and older natural law thinking'.[22] Stephanie Heinsohn, writing a dissertation about the historical origins of the public law principle of proportionality in German law, sees some aspects of the principle already present in philosophical writings on the nature of state by 'natural law' proponents of the eighteenth century. She argues, however, that the principle was not fully worked out in German public law until after 1945.[23] Her analysis is confirmed by other authors.[24] Therefore it cannot be excluded that when the German Constitutional Court decided to use the principle in its constitutional interpretation, it was guided not only by the understanding of the principle present in other areas of German public law (especially administrative law) but possibly also by the philosophical appeal of the idea of proportionality.

The idea had been alive in philosophy long before it became part of the German constitutional law. Aristotle, writing his famous thesis on ethics in 350 BC, mentions proportion in his discussion of the virtue of justice.[25] In the thirteenth century, Aquinas uses the idea of proportionality in his analysis of self-defence.[26] The nineteenth-century French moral theologian Jean Pierre Gury coins proportionality as one of the four conditions of the 'principle of double-effect'.[27] This 'principle' became very popular and may have provided the inspiration for infusing the idea of proportionality to

the Principles of Proportionality' in JL Jowell et al (eds), *Understanding Human Rights Principles* (Oxford, Hart Publishing, 2001) 28.

[19] BVerfGE E 3, s 383, 399 (1954).

[20] *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (1979–80) 1 EHRR 252, Part I, B, para 10.

[21] Wittig, 'Zum Standort des Verhältnismäßigkeitsgrundsatzes Im System des Grundgesetzes' [1968] *Die Öffentliche Verwaltung* 817.

[22] D Robertson, *A Dictionary of Human Rights*, 2nd edn (London, Europa Publications, 2004) 185.

[23] S Heinsohn, *Der Öffentlichrechtliche Grundsatz der Verhältnismäßigkeit: Historische Ursprünge Im Deutschen Recht, Übernahme in Das Recht der Europäischen Gemeinschaften Sowie Entwicklungen Im Französischen Und Im Englischen Recht* (Westfälisch Wilhelms-Universität, 1997) 74.

[24] Eg G Nolte, 'General Principles of German and European Administrative Law: A Comparison in Historical Perspective' (1994) 57 *Modern Law Review* 191, 201–02.

[25] Aristotle and WD Ross, *The Nicomachean Ethics of Aristotle*, World's Classics 546 (London, Oxford University Press, 1954) Book V, s 3.

[26] T Aquinas, *The Summa Theologica*, 2nd and rev edn, trans Fathers of the English Dominican Province 1920 (online edition copyright K Knight, 2008) II-II, Q 64, a 7.

[27] JP Gury, *Compendium Theologiae Moralis* (Regensburg, F Pustet, 1874) as cited in Kaczor, 'Double-Effect Reasoning from Jean Pierre Gury to Peter Knauer' (1998) 59 *Theological Studies* 297.